Andrews v. Great Gulf, [2019] O.H.R.T.D. No. 281

Ontario Human Rights Tribunal Decisions

Panel: Romona Gananathan, Vice-chair

Decision: March 1, 2019.

File No. 2018-33317-I

[2019] O.H.R.T.D. No. 281 | 2019 HRTO 370

Between Charlie Andrews, Applicant, and Great Gulf, Respondent

(21 paras.)

Appearances

Charlie Andrews, Applicant: Self-represented.

Great Gulf, Respondent: Kimberly Pepper, Counsel.

DECISION

INTRODUCTION

1 The applicant filed an Application alleging that the respondents discriminated and/or reprised against them in goods, services, and facilities on the basis of gender identity and gender expression, contrary to the *Human Rights Code*, *R.S.O. 1990 c. H. 19*, as amended (the "*Code*"). The applicant, a condominium owner, alleges that the respondent builder of the condominium complex, failed to provide gender-inclusive washrooms in the pool and steam room areas of the condominium building.

2 By Case Assessment Direction ("CAD"), the Tribunal directed that a combined preliminary/summary hearing be held to address whether the Application should be dismissed on the basis that there is no reasonable prospect that it will succeed, and because the Application appears to have been filed more than one year after the last incident of alleged discrimination.

3 At the outset of the teleconference hearing, counsel for the respondent requested an adjournment. The applicant had disclosed medical documentation with respect to the issue of delay at 1:00 a.m. the previous night, and she required additional time to prepare for the hearing. The applicant was travelling and did not wish to adjourn for too long because it was after midnight in their time zone. I proposed that the hearing reconvene in an hour and that I would hear submissions only on the issue of whether the Application had a reasonable prospect of success, with the understanding that we reconvene on the issue of delay if necessary.

4 Based on the submissions and as explained more fully below, I find that the Application must be dismissed on the basis that it has no reasonable prospect of success under the *Code*. I accept that the respondent in this case does not have an ongoing service relationship with the applicant with respect to the pre-existing design of the building and for that reason cannot be held liable for the alleged discrimination. Even if I accept all of the facts

alleged by the applicant as true, the applicant has not been able to point to any evidence that the respondents failed to provide gender-inclusive change rooms, despite being asked to do so by anyone. I also accept that there was no positive obligation on the respondent to ensure inclusive design at the time the building was constructed.

SUMMARY HEARING PROCESS

5 The summary hearing process is described in Rule 19A of the Tribunal's Rules of Procedure ("Rules") as well as the Tribunal's Practice Direction on Summary Hearing Requests. The purpose of a summary hearing is to consider, early in the proceeding and usually before a Response is filed, whether an application should be dismissed in whole or in part because there is no reasonable prospect that the application will succeed.

6 The Tribunal cannot address allegations of unfairness that are unrelated to the *Code*. The Tribunal's jurisdiction is limited to claims of discrimination that are linked to the protections set out in the *Code*.

7 The test that is applied at the summary hearing stage is whether an application has no reasonable prospect of success. At this stage, the Tribunal is not determining whether the applicant is telling the truth or assessing the impact of the treatment he or she experienced. The test of no reasonable prospect of success is determined by assuming the applicant's version of events is true unless there is some clear evidence to the contrary or the evidence is not disputed by the applicant.

8 The focus in this particular case is on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation by the named respondent.

9 Having set out the basic framework for determining whether an application should be dismissed because it has no reasonable prospect of success, I now turn to the facts of this particular case.

FACTUAL BACKGROUND

10 The applicant purchased a home from the respondent prior to the buiding being constructed and moved into the building on June 4, 2016. Upon moving in the applicant realized that the pool and sauna areas did not have gender-inclusive washroom facilities. As a result, the applicant is forced to trek through the building and the elevator in soaking wet bathing attire causing embarrassment, because they are unable to change while using the amenities. The applicant alleges that the respondent is a large scale developer, and that it has a social responsibility to ensure that the spaces it builds are non-discriminatory to those who aren't gender binary. The respondent's failure to provide gender-inclusive washrooms in the building including the pool and steam room areas, prevents the applicant's full enjoyment of the amenities as a condo owner.

11 The applicant concedes that they did not request that the respondent make these changes upon moving into the building. The applicant was elected to the Board of Directors of the condominium corporation shortly after moving in, and was actively involved in reviewing the blueprints and ensuring the building warranty changes were made to the common areas. They were also involved in putting up notices in the elevators and common areas about the building being a diverse and positive community, and had already addressed concerns about different stairwell access for residents. As a result, the applicant submits that they knew that doing these kinds of retrofit changes to ensure non-gender binary washrooms would not be possible after the building was completed. However, they submit that they brought this Application forward to ensure that the respondent's design team be made aware of the issues and can plan to be inclusive in their designs in the future.

12 The respondent submits that it does not have a service relationship with the applicant. Great Gulf constructed the building and sold five units to the City of Toronto and Artscape pursuant to a development agreement. It submits that the unit that was purchased by the applicant was sold by the City of Toronto and Artscape to qualified artists as a special program to support artists with home ownership. As a result, the respondent submits that it did not have a service relationship with the applicant.

13 In any event, the respondent submits that the residential condo units in a condominium building are owned by each resident, but that the common areas including any amenities are jointly owned by the condominium corporation which is solely responsible for those common elements. As a result, the respondent in this case is not responsible for the common elements. The respondent takes the position that if there are any issues with respect to accessibility, it is the responsibility of the condominium corporation, of which the applicant is a member. It submits that the building was planned and built well before this applicant took possession of the unit, and that it is no longer in the picture as its only obligation is with respect to warranty repairs.

14 The respondent also submits that under the Ontario Human Rights Commission's policy of gender expression and gender identity - the *Code* allows for restrictions based on public decency under s. 20 of the *Code*. The respondent also submits that the concept of providing non gender-binary washroom facilities is relatively new and that there was not much awareness of inclusive design when the building was being planned and designed. There was also nothing in the building code that speaks specifically to the issue or requires non-gender binary washrooms in buildings. As such, they respondent submits that there is no *prima facie* case of any *Code* violation in this case.

ANALYSIS AND Findings

15 Even if I accept the facts put forward by the applicant as true and provable, I must find that the Application stands no reasonable prospect of success under the *Code*. Regardless of whether the applicant purchased the unit from the respondent or the City of Toronto and Artscape, it is clear that the issue of equal access to facilities in the common areas of the building is the responsibility of and must be addressed by the condominium corporation, of which the applicant was a board member.

16 With regard to the building design itself, the applicant was unable to point to any evidence that could link the respondent's actions to their particular *Code* grounds. Inclusivity with respect to gender identity and gender expression is evolving but a relatively new area, particularly in regards to building design and construction. For example, in 2012 "gender identity" and "gender expression" were added as grounds of discrimination in the *Code* pursuant to *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*. The Ontario Human Rights Commission's *Policy on Preventing Discrimination Because of Gender Identity and Gender Expressio*n was approved in 2014 recommending that organizations should design or change their rules, practices and facilities to avoid negative effects on trans people and be more inclusive for everyone. Bill C-16 amendments to the *Criminal Code* and the *Canadian Human Rights Act* was passed in Canada in June 2017 legally protecting the rights of individuals to use a washroom or change room corresponding to their gender identity. The International Building Code was only amended in 2018 to reflect fixture calculations and signage suggestions for universal washrooms. These building code requirements have yet to be adopted in local jurisdictions including Ontario.

17 I accept that the building was designed and built years or at least months before these changes and before the applicant purchased the unit. There is also no evidence or suggestion that the builders in this case refused to consider or incorporate aspects of design that would have ensured the equitable access issues raised by the applicant in this proceeding in respect of common facilities. This is particularly true because the applicant did not raise any concerns with respect to the lack of gender-inclusive amenities even after they moved in during the time that the respondent was completing its warranty repairs to the common areas, although the applicant was a member of the board of the condominium corporation and involved in this process.

18 The applicant's allegations are in essence related to the respondent's under-inclusive design. In my view, a basis on which the respondent might have been found to have discriminated on the basis of *Code* grounds in relation to under-inclusive building design would have been if its client (assuming it had one, and in this case it appears to be the City of Toronto or Artscape) had asked for gender-inclusive washrooms or change rooms in the common areas of the building, but it had refused to build it into the design under its development agreement. However, there was no evidence that the applicant could point to that the respondent was asked by anyone to build

an inclusive building with gender-inclusive washrooms but had failed to do so. I appreciate that condominium developers would often be solely responsible for building design, rather than be designing based on an existing client's instructions. However, even in that situation the relationship between a purchaser and a developer/seller would arise with respect to the purchase and sale agreement itself. The design itself would not be the subject of any ongoing service (or tenancy) relationship after a purchase was made, subject of course to any ongoing obligations contained in the agreement itself.

19 I am not persuaded that the respondent does not have any ongoing service relationship with the applicant, particularly since there seems to be an ongoing obligation with respect to warranty repairs to the applicant's own unit. However, there is no basis to conclude that any ongoing obligations with respect to warranty repairs are engaged by the allegations in this application.

20 The applicant concedes that they have not requested any accommodations or otherwise raised the issue of the need for gender-inclusive washrooms in the pool and sauna areas. I applaud the applicant's principled goals of ensuring that the future designs of this home developer are more inclusive, but this may be a larger policy objective that cannot be addressed through this Application. While the building construction may be complete, there could be many possible ways to accommodate the needs of residents who do not identify with binary genders, for example through alternating use of spaces, or designating certain spaces as gender-inclusive. At this point, it is the condominium corporation who would be responsible for such issues and in order for the applicant to trigger these obligations, they must first raise the issue and make a request to the condominium corporation.

ORDER

21 For all of the above reasons, the Application is dismissed.

Dated at Toronto, this 1st day of March, 2019.

"Signed by"
Romona Gananathan
Vice-chair

End of Document